Como v Stable 49 Ltd.
2016 NY Slip Op 31101(U)
June 14, 2016
Supreme Court, New York County
Docket Number: 161483/2013
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7

NATALIE COMO,

Plaintiff,

-against-

STABLE 49 LIMITED and
LORE MONNING,

Defendants.

Index No.: 161483/2013
DECISION/ORDER
Motion Seq. No. 003

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant Lore Monning's motion for summary judgment.

Papers	**Numbered**
Defendant's Notice of Motion	1
Stable 49 Limited's Affirmation in Opposition	2
Plaintiff's Affirmation in Opposition	3
Moving Defendants' Reply Affirmation to Plaintiff's Affirmation in Opposition	4
Moving Defendants' Reply Affirmation to Defendant's Affirmation in Opposition	5
Plaintiff's counsel's letter of May 20, 2016	6

Pazer, Epstein & Jaffe, P.C., New York City (Matthew J. Fein of counsel), for plaintiff.
Rubin, Fiorella & Friedman, LLP, New York City (Wendy Eson of counsel), for defendant Stable 49 Limited.
Miller, Leiby & Associates, P.C., New York City (Jeffrey R. Miller of counsel), for defendant Monning.

Gerald Lebovits, J.

Upon the foregoing papers, it is ordered that defendant Lore Monning's CPLR 3212 motion for summary judgment is denied.

For a court to grant a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact about the claim or claims at issue. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The movant has the burden to establish that no issues of material fact exist. (*Id.*) Once this burden is met, a party opposing summary judgment must then demonstrate by admissible evidence the existence of factual issues requiring a trial. (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 164 [1990].) Monning has not met her initial burden. A dispute exists about whether plaintiff Natalie Como's accident was Monning's fault.

I. Location of the Accident

Como seeks damages for personal injuries allegedly caused when she tripped over a sidewalk. Monning argues that she is not the owner of the allegedly defective area of the sidewalk or of the property abutting the sidewalk, where plaintiff's accident allegedly occurred.

Monning argues that NYC Admin. Code § 19-152 imposes on an owner of real property a duty to maintain sidewalks abutting that property. According to Monning, plaintiff supposedly did not trip on any portion of the sidewalk abutting Monning's property, Monning did not violate the NYC Admin. Code and therefore breached no duty owed to plaintiff. (Defendant's Affirmation in Support, at ¶¶ 3-4.)

Monning further argues that the examination before trial (EBT) testimony plaintiff gave about where plaintiff fell and what caused plaintiff to fall indicates that Monning could not possibly be liable for the accident. (Defendant's Affirmation in Support, at ¶¶ 3-4.)

Monning relies on *Sangaray v W. Riv. Assoc., LLC.* (26 NY3d 793 [2016].) She argues that the facts of the instant case are almost identical to those in *Sangaray*. But the trial court's decision in *Sangaray* has been reversed.

The Court of Appeals found that the trial court in *Sangaray* erred in its summary-judgment dismissal of the plaintiff's suit. (*Sangaray*, 26 NY3d at 800.) The suit alleged that the defendant violated Administrative Code of the City of New York § 7-210 by failing to maintain a sidewalk abutting its property. (*Id.* at 796.) The defendant in *Sangaray* argued that the defect that caused the plaintiff to trip did not abut the defendant's property. The Court of Appeals found that Section 7-210 (b) does not preclude a landowner's liability for accidents that occurred on its own abutting sidewalk if the landowner's failure to comply with its duty to maintain its sidewalk in a reasonably safe condition was a proximate cause of the plaintiff's injuries. (*Id.* at 799.)

The location of an alleged defect and whether it abuts a particular property affects a property owner's duty to maintain a sidewalk in a reasonably safe condition. (New York City, N.Y., Code § 7-210.) However, "a neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained." (*Sangaray*, 26 NY3d at 799.) Monning also cites *Montalbano v 136 W. 80 St. CP.* (84 AD3d 600 [3d Dept 2011] [finding that because defendant's property did not abut the portion of the sidewalk where plaintiff fell, defendant had no duty to maintain that portion of the sidewalk].) (Defendant Monning's Notice of Motion, ¶ 33.) *Sangaray* suggests that *Montalbano* and other similar cases should no longer be followed to the extent that they interpret § 7-210 as holding that only the landowner whose property abuts the defect upon which the plaintiff trips may be held liable.

The plaintiff in *Montalbano* did not argue that the defendant failed to maintain the sidewalk flag abutting his property in a reasonably safe condition. In contrast, the plaintiff in *Sangaray* argued that the owner of the abutting premises failed to comply with its own statutory duty to maintain the sidewalk abutting its premises in a reasonably safe condition and that the

failure was a proximate cause of the plaintiff's injury. (26 NY3d at 798-799.) The Court of Appeals raised this distinction in *Sangaray*. (*See id.* at 798.)

To show a prima facie entitlement to summary judgment, the defendant in *Sangaray* had to do more than simply demonstrate that the alleged defect was on another landowner's property. (*Id.* at 798.) The defendant in *Sangaray* instead focused his argument solely on the location of the actual defect on which the plaintiff allegedly tripped and ignored its burden of demonstrating that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and that it was not a proximate cause of plaintiff's injuries. (*Id.* at 798; *see also James v Blackmon*, 58 AD3d 808, 809 [2d Dept 2009] [holding that defendant failed to provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries].)

Monning has submitted a field survey and accompanying affidavit of Vincent J. Dicce, L.S., to establish that she does not own the property abutting the sidewalk expansion joint where the accident is alleged to have occurred. (Defendant Monning's Notice of Motion, Exhibits 7-8.) But the field survey does not resolve material issues of fact about the claim at issue. Dicce's field survey refers only to the location of the sidewalk expansion joint at issue and not any related damage to the sidewalk. As Como argues, the field survey does not address the possibility that the broken sidewalk flag in front of Monning's property could be a proximate cause of the accident. (Plaintiff Como's Affirmation in Opposition, at ¶¶ 12-15.) Co-defendant Stable 49 Limited further argues that the exact location of the accident has not been established. As argued by Stable 49 Limited, it is unclear where Como's toe was located at the moment the accident occurred. (Defendant Stable 49's Affirmation in Opposition, at ¶¶ 6-7.) This material issue of fact must be resolved at trial.

Monning testified that she uses the sidewalk abutting her property as a driveway for vehicles to enter her premises at 45-47 Downing Street. (Plaintiff's Affirmation in Opposition, Exhibit D) A cracked flagstone in this area abuts the sidewalk seam where the accident allegedly occurred. Therefore, damage to the cracked flagstone could have been a proximate cause of the accident. This material issue of fact must also be resolved at trial.

II. Plaintiff's Affidavit

Monning argues that Como has submitted a self-serving affidavit that contradicts plaintiff's own EBT testimony. (Defendant Monning's Reply Affirmation to Plaintiff's Affirmation in Opposition, at ¶ 21.) In contrast to the facts in *Phillips v Bronx Hosp.* (268 AD2d 318 [1st Dept 2000]), plaintiff's affidavit does not, as Monning argues, "clearly contradict plaintiff's own deposition testimony" or appear to have been "tailored to avoid the consequences of her earlier testimony." (Defendant Monning's Reply Affirmation to Plaintiff's Affirmation in Opposition, at ¶ 22.)

Como's affidavit seeks to add further detail to the previous testimony she gave at her EBT rather than alter it. Como's EBT testimony about the location of the accident was brief and narrowly focused on where, exactly, the accident occurred. She did not testify about the area

adjacent to where the accident occurred and was unspecific about how any damage to sidewalk flags had developed. The evidence plaintiff gave at her EBT about the location of her accident also requires further elaboration to understand whether Stable 49 Limited's property could have contributed to her accident. It is also unclear whether the "crack" to which Como referred at her EBT was the sidewalk seam or a crack adjacent to the sidewalk seam. (Defendant's Notice of Motion, Exhibit 5, Page 23, Line 2-Line 6; Plaintiff's Affirmation in Opposition, at ¶ 7.)

Monning has not met her burden of establishing her entitlement to summary judgment. Material issues of fact exist. The cause of the accident is unclear, as is the location of the accident. This court cannot resolve the Administrative Code § 7-210 issue as a matter of law at this phase.

Summary judgment must be denied where there is any doubt as to the existence of material and triable issues of fact or where the issue is arguable. (*Rotuba Extruders v.Ceppos*, 46 NY2d 223, 231 [1978]; *Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957].)

ORDERED that defendant Monning's CPLR 3212 motion is denied.

This is the court's decision and order.

Dated: June 14, 2016

J.S.C.

HON. GERALD LEBOVITS
J.S.C.